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RIGHT OF A WITNESS TO THE STATUTORY FEE PER DIEM DURING HIS DETENTION IN JAIL.

In the absence of a statutory provision, a witness summoned by the state in a criminal case has no claim to compensation by the state. *Ex Parte Manning* (1803), 1 Caines Rep. (N. Y.), 59; *Bennett v. Kroth,* 37 Kan., 235; *O'Kane v. People,* 46 Ill., App., 225; *Israel v. State,* 8 Ind., 467; *State v. Whithed,* 3 Murphy (N. C.), 223. Even though the accused is acquitted, he is liable for the fees of the witnesses called in his behalf, but in that case he is not liable for the fees of the witnesses called in behalf of the prosecution. *Avery v. State,* 7 Bax. (Tenn.), 331; *Bennett v. Kroth,* 37 Kan., 235; *State v. Whithed, supra.* But most States have passed statutes providing that all witnesses shall be entitled to a per diem fee for the time that they are in "attendance at court." The language of the statutes in the various states differs but little, and in most all of the states the provision, in substance if not in words, allows the fee for each day's "attendance at court." This raises the question as to what constitutes "attendance at court" within the meaning of the statutes.

Under one of these statutory provisions, it was recently held in *Kirke v. Strafford County,* 80 Atlan. (N. H.), 1046, where a witness, summoned to testify in the police court, was ordered to give surety for his appearance before the Superior Court, and being a stranger in that town, was unable to give the required surety, and because of failure to furnish surety was committed to jail, he was entitled to witness fees for the time so confined. In allowing fees for the eighty days that witness was detained in jail, the court said that he was during that time "in attendance at court" within the meaning of the statute. The court intimated that its decision was influenced, if not determined, by the fact that the failure to give surety was due to no fault of the witness. The witness was a stranger in that town. The failure to get surety was not due to unwillingness or to a bad reputation.

Because of the fact that it rarely happens that a witness is required to be committed to jail to await his appearance in court, and also because of the small amount of money involved when it does occur, the question of the right of the witness to the statutory fee under such circumstances seldom comes before our higher courts. Consequently, there are but few decisions to be found on this point, but the courts that have passed on it are in conflict. The decision in the principal case is supported by *Robinson v. Chambers,* 94 Mich., 471; *In re Higgins' Case* 12; *Fed. Case No.* 6471 (1 Cranch. C. C., 73); and *Hall v. Somerset County,* 82 Md., 618. In all these cases the decision was based on the assumption that the failure to give surety was due to no fault of the witness. The view of these courts is clearly and specifically stated in *Hall v. Somerset County, supra,* when the court said, "We hold first, that if a witness can, but will not give security for his appearance and is committed for his refusal, he will not be entitled to a per diem fee during any part of the time he may be detained to secure his attendance. Secondly, that if his inability to find security results from his own misconduct or bad character, he will not be entitled to a per diem fee. Thirdly, that if he is committed because of inability to furnish a recognizance and if his inability arises from his misfortune and not from his fault, he will be considered as in attendance on the court and entitled for the term of his detention."

No doubt this holding works justice by giving the innocent witness some compensation for the time he is detained. But since

the court for which he is detained is not in session, it is submitted that it is difficult to see how the witness confined in jail can be "in attendance at court" as the statutes require. This difficulty was met by the court in *Marshall County v. Tidmore,* 74 Miss., 317, by holding that the witness was entitled to the fee for only those days that the court was in session while he was confined.

Another line of cases holds that one so detained is not "in attendance at court" regardless of whether it happens to be in session, and therefore he is not entitled to a fee for the time detained in jail for failure to give surety. *Markwell v. Warren County,* 53 Iowa, 422; *State v. Walsh,* 44 N. J. L., 470; *Howard v. Beaver County,* 6 Pa. Co. ct. R., 397; *Slucks v. County of Luzerne,* 16 Pa. Co. ct. R., 221; *State v. Greene,* 91 Wis., 500. These cases refuse to give the phrase "in attendance at court" such a liberal construction as to have it cover the case of a witness committed to jail in default of surety for his appearance in court.

From an examination of the limited number of cases that can be found on this point, it would seem that authorities are quite evenly divided, but that probably the weight of authority is contrary to the decision in the principal case. But that the holding of the principal case is more equitable can hardly be questioned.